KRISHNA MURTHEY & ANOR.

v.

LAW LYE CHUA

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL APPEAL NO. 12-59-1989]
30 DECEMBER 1991

TORT: *Accident - Three different versions of the accident - Onus of proof on plaintiff.*

The plaintiff was involved in a motorcycle accident with the 1st defendant. The plaintiff, 1st defendant and PW5 an eyewitness to the accident all gave contradictory versions of the accident. In view of the contradictions, the Sessions Court Judge held that the plaintiff and defendant were equally liable. The defendants appealed and the plaintiff cross-appealed.

Held:

[1] When the story of the plaintiff and defendant is equally disbelieved, liability is not apportioned equally; liability has to be decided on onus of proof.

[2] The onus in this case is not on the defendant to prove that he was not negligent.

[3] The sessions Judge should have dismissed the plaintiff's claim as the plaintiff had failed to prove his claim.

[Appeal allowed. Cross appeal dismissed.]

Cases referred to:
Loh Soh Ming & Anor. v. Krishnan [1967] 1 MLJ 8 ***(foll)***
Ng. Chiu Sia v. Maimon bt. Ali [1983] 1 MLJ 110 ***(foll)***

For the appellant - Shan Gnasalingam; M/s. Daim & Gamany
For the respondent - N.M. Tiong; M/s. N.M. Tiong & Co.

JUDGMENT

KC Vohrah J:

There was an accident on 27 October 1986 involving 2 motor cycles, one ridden by the plaintiff and the other by the 1st defendant travelling along the Sungai Petani - Kuala Ketil road. The learned Judge of the Sessions Court Sungai Petani who heard the case was of the view that since there were 3 contradictory versions of the accident - one by the plaintiff, one other by the 1st defendant and yet another by the plaintiff's witness, PW5 - it was difficult to decide on the question of liability. He found the evidence of the plaintiff and the first defendant to be full of contradictions and he also found that "they are not only contradicting each other but the evidence adduced in Court is in itself contradictory." And he concluded, "Under such circumstances I hold them equally liable."

The defendants appealed and the plaintiff cross-appealed against this finding of the learned Judge. I allowed the appeal and dismissed the cross-appeal.

It is not disputed that both the motor cycles were travelling on the correct side, i.e. the left side, of the road. They were both travelling from the direction of Sungai Petani towards Kuala Ketil. The sketch plan shows a junction on the right hand side of the road as one faces Kuala Ketil. The accident scene was near this junction. The witness of the plaintiff, PW5, claimed that he was at this junction when he witnessed the accident.

The plaintiff stated that he was riding his motor cycle close to the left edge of the road when his motor cycle was collided into directly in the rear by something. On impact, the plaintiff stated, his motor cycle fell on its right side. The plaintiff's witness, PW5, (the plaintiff's neighbour as well), claimed that when he was at the junction in his motor van he saw on his left the plaintiff and the 1st defendant riding their motor cycles. On his right he saw two cars in a line travelling in the direction of the motor cycles on their correct side of the road. He said he saw the rear motor car overtake the front motor car. He also saw the rear motor cycle (ridden by the 1st defendant) which was in the process of overtaking the plaintiff's motor cycle swerve to the left as the motor car in front encroached on his path. The 1st defendant's motor cycle then knocked into the plaintiff's motor cycle.

It has to be noted here that, in contrast to the evidence of PW5, the plaintiff never mentioned about the approaching cars let alone a motor car encroaching on his side of the road. Surely that is an important piece of evidence and would have been mentioned if it had occurred. Then again while the plaintiff said that the collision was a direct collision into the rear of his motor cycle near the number plate, PW5 said that the front tyre of the 1st defendant's motor cycle knocked into the right footrest of the plaintiff's motor cycle. I would advert again to the evidence of PW5 later in this judgment.

As for the 1st defendant, he said that he was on his motor cycle following the plaintiff on his motor cycle, not directly behind him but more to the right. When he finally caught up with the plaintiff and was about to pass him, the plaintiff suddenly turned to the right without prior warning and knocked into his motor cycle.

The learned Judge of the Sessions Court faced with 3 versions of the accident sought the assistance of the sketch plan. It showed the plaintiff's motor cycle on its correct side of the road near the junction and the 1st defendant's motor cycle on the other side of the road nearer the mouth of the junction. There were glass fragments near the 1st defendant's motor cycle but as was pointed out correctly by the learned Judge that did not indicate the point of impact of the two vehicles. The sketch plan thus was not helpful save for showing that the 1st defendant's motor cycle was on the other side of the road.

The learned Judge in his judgment spent some time evaluating the evidence of the plaintiff, his witness, PW5, and the defendant and pointed out the inconsistencies and discrepancies in their evidence. And it is quite obvious he did not find them to be credible witnesses.

Plaintiff's Counsel argued before me that the learned Judge had erred in evaluating the evidence of the plaintiff without paying due regard to a statement in the specialist medical report that the plaintiff had suffered brain injury; in other words the plaintiff had impaired memory and could not therefore accurately recall the accident. Counsel said that the Judge should instead have considered the evidence of PW5 and he claimed the Judge failed to do so.

As regards the brain injury of the plaintiff, the plaintiff's Counsel stated that the plaintiff gave evidence that he was going towards Sungai Petani when in fact he was travelling in the opposite direction towards Kuala Ketil when the accident occurred. But it has to be pointed out that the plaintiff corrected himself during re-examination and stated with particularity that after he had visited a friend at the Sungai Petani District Hospital he met with the accident while going towards Kuala Ketil. Earlier under cross-examination he had gone into detail in recollecting the accident, that there was no vehicle in front of him, that he was travelling at 30 m.p.h, that he was riding close to the left of the road, that he was knocked from the back, that there was a direct collision near the number plate, that he did

not brake but the motor cycle fell on its right side, that he was sent to the Sungai Petani hospital and then later to Lam Wah Ee Hospital. His evidence certainly did not indicate that he could not remember how the accident occurred. And there was no claim by him that he had a poor memory and could not recollect the facts relating to the accident.

And as for the story of PW5 the learned Judge did consider it but how could he accept an implausible story? The plaintiff's story was that of a car overtaking another and encroaching on the path of the 1st defendant forcing the 1st defendant's motor cycle to swerve to its left and knock against the plaintiff's motor cycle. If this story is true then the 1st defendant's motor cycle would have fallen on the left side of the road not on the other side, the right side, of the road. The evidence, however, clearly shows that the 1st defendant's motor cycle fell on the other side of the road near the mouth of the junction on that side. Then also one wonders how the 1st defendant was not knocked either by the encroaching car or by the car that was overtaken when his motor cycle went across to the other side of the road and fell down, if PW5's story of the overtaking and encroaching car is true. Then again, he supposedly saw an accident involving his neighbour yet he did not render assistance to him; instead, he said, he immediately left to inform the family of the plaintiff about the accident. Under cross-examination he said he did not stop to render assistance because he had to deliver rice. How is it he could immediately go and inform the plaintiff's family of the accident yet had no time to render assistance to a neighbour? The evidence of PW5 was, to say the least, highly suspect. And the learned Judge was right in also rejecting it.

Thus I do not think I can fault the learned Judge when he concluded that he found the evidence of the plaintiff and the first defendant to be full of contradictions and that the evidence of the one not only contradicted the evidence of the other but the evidence adduced in Court was in itself contradictory.

The point is that where the story of the plaintiff is disbelieved and that of the defendant is equally disbelieved, liability is not apportioned equally; liability has to be decided on onus of proof. What should be borne in mind are the words of Lord Dunedin quoted by H.T. Ong FJ (as he then was) in *Loh Soh Ming & Anor. v. Krishnan* [1967] 1 MLJ 8 at p. 11 in the following passage:

> Last and by no means the least, in a case like this, where both the plaintiff's and the defendants' story had been equally disbelieved, I think the principle enunciated in *Robins v. National Trust Co.* [1927] AC. 515, 520 should have been applied. There it was said by Lord Dunedin as follows:
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> > Now, in conducting an inquiry, the determining tribunal, be it Judge or jury, will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or as it is often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter.

Clearly the learned Judge in this case should have decided the case on the onus of proof.

The onus is not on the defendant to prove that he was not negligent. As was succinctly pointed out by Hashim Yeop A. Sani J (as he then was) in *Ng Chui Sai v. Maimon Bt. Ali* [1983] 1 MLJ 110:

> In an action for negligence the onus of proving the allegation of negligence rests on the person who makes it unless there are disclosed facts which raise a presumption in favour of the plaintiff. The plaintiff must show affirmatively that there has been a breach of a specific or

genuine duty by the defendant and this resulted in the damage to the plaintiff. If he fails to prove this the action must fail.

The learned Judge in the case under appeal should have dismissed the plaintiff's claim as the plaintiff had failed to prove his claim. I therefore allowed the appeal and dismissed the cross-appeal with costs.

Also found at [1992] 1 CLJ 684